

GOOD FAITH IN CONTRACT: A UNIQUELY SOUTH AFRICAN PERSPECTIVE

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ABSTRACT. While the doctrine of good faith has always played a role in South African contract law, it is currently being reshaped by the courts under a banner of “transformative constitutionalism”. Of particular interest in this development is the role of an indigenous value of fair dealing, captured by the vernacular term “ubuntu”. The article will (1) compare the Canadian findings in Bhasin with the current South African status quo, and (2) comment on the evolving legal culture of contract in South Africa. In this regard, the role and meaning of ubuntu will be contextually evaluated using social science materials. In combination, this will provide a uniquely South African perspective on an area of contract law which is evolving in the Commonwealth.

KEYWORDS: Contract, good faith, South Africa, constitutional law, indigenous values, Ubuntu, informal economy.

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I. INTRODUCTION

What standard of behaviour is expected of contracting parties when interacting in the market-place? Is there a notional (business) community, whose values frame the setting of this standard? If so, how do we define that community and against whose set of values are we going to establish this frame of reference? In comparative law, legal culture is often determinative of the answer to this type of question.¹ In modern diverse societies, legal cultures may vary within a particular country – giving rise to the notion of legal pluralism.² This article has a twofold aim: first, to outline in broad terms an answer to the initial question posed as to the prevailing legal standard of contractual conduct with regard to positive law in South African courts; secondly, to discuss this question from a plural point of view, including the South African indigenous law perspective. Aim one will involve setting out the familiar concepts of comparative contract law; aim two will encompass a more law and society account of contract practice in South Africa's "popular economy".³

¹ From a comparative law theory perspective, the "legal transplants" debate illustrates this point well: O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 *MLR* 1; A. Watson, *Legal Transplants: An Approach to Comparative Law* (2ed University of Georgia Press 1993); P. Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 *Maastricht J Eur & Comp L* 111. In South Africa, the seminal text on legal culture (in a slightly different context) is: K. Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146.

² For a definition of legal pluralism, see for example: J. Griffiths, "What is Legal Pluralism?" (1986) 24 *J Leg Plur & Unoff L* 1. For a South African view, see T. Bennett, "African Customary Law" in M. Reimann and R. Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP, 2008) 641, 666-71.

³ The term popular economy is intended here to refer in particular to the informal economies of many of South Africa's large urban "townships" (see note 11 below). The term popular economy is preferred, since there are many elements of the formal economy which influence this sector. The concept will be unpacked further below in part III. For an introduction see E. Hull & D. James, "Introduction: Popular Economies in South Africa" 82 *Africa* 1. The other articles in the same volume of this journal are also in point.

The question as to whether there is a duty of good faith in a given system of contract law is an ideological question, which can be used in many cases as a defining characteristic of different legal families in comparative contract law. As the cliché goes: in Germany (as a Civil law example at one end of the spectrum) all contracts are based on good faith – this is so trite that it goes without saying;⁴ in English law (to take the Common law⁵ archetype at the other end of the range) good faith is exceptionally controversial – there is no default rule or standard against which to judge contractual conduct, fair dealing is ensured through other technical rules, such as those on misrepresentation.⁶ In between, one might place a mixed legal system like South African law, which (arguably) under English law influence has historically maintained a fairly conservative line on the role of a positive duty of good faith in contract law, while still claiming that all contracts were based on an underlying requirement of good faith conduct which was not independently actionable.⁷ Thus for a South African

⁴ Section 242 of the Bürgerliches Gesetzbuch (BGB). For discussion, see S. Whittaker & R. Zimmermann, “Good faith in European contract law: surveying the legal landscape” in R. Zimmermann & S. Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000) 7, 18-32; B.S. Markesinis, H. Unberath & A. Johnston, *The German Law of Contract: A Comparative Treatise* - (2nd ed, Hart 2006) 119-33.

⁵ In this article, “Common law” (upper case “C”) is used to denominate the legal family originating in English law; “common law” (lower case “c”) is used to denominate the South African common law, which is a slightly different concept, briefly defined below at the beginning of part II.

⁶ See eg *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 (CA) 439; *Walford v Miles* [1992] 2 AC 128 (HL) 138; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 [105]; Lord Steyn, “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997) 113 LQR 433. See, however, *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [119]-[154].

⁷ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [22]; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [81]-[82]. See also R. Zimmermann, “Good faith and equity” in R. Zimmermann and D. Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (OUP 1996) 217, 239-41; D. Hutchison, “Good faith in the South African law of contract” in R. Brownsword, N.J. Hird & G. Howells (eds), *Good Faith in Contract: Concept and Context* (Ashgate 1999) 213, 213-14.

interested in comparative contract law, the finding by the Canadian Supreme Court in *Bhasin v Hrynew* that good faith was an organising principle of the Canadian law of contract and that it encompassed a minimum core of honesty in performance of contractual duties, was an extremely interesting one.⁸ This is both because Canada belongs to the Common law family, making this finding a departure from tradition, and because in making that finding, the Canadian Supreme Court engaged in a useful and detailed discussion of what the standard of good faith in contract law involves.

For the comparative lawyer, perhaps the most interesting and unusual part of contemporary South African contract law is the synthesis being crafted here between indigenous values and the common law of contract.⁹ A perfect study of this is the ongoing process of judicial development of norms of fair dealing in contract. Value laden open norms in contract law provide the ideal vehicle for a discussion of what values should go into setting this standard. We have several open norm contenders, however: from public policy, to good faith, to (much more recently) ubuntu. So-called “transformative constitutionalism”¹⁰ rests on these open norms, particularly public policy. What role can there be for good faith as a separate standard, largely side-lined by the Constitutional Court thus far? And what is the difference between good faith and ubuntu – is this the indigenous law functional equivalent of the good faith concept?

⁸ *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 SCR 494 [33].

⁹ In South African contract law this development currently centres on the role of “ubuntu” (an indigenous African value of communal solidarity). This concept and the nature of the process of synthesis will be discussed in detail below.

¹⁰ See the definition of this concept in Klare, “Legal Culture and Transformative Constitutionalism” (n 1) 150. See further [Former Chief Justice of the Constitutional Court] P. Langa, “Transformative Constitutionalism” (2006) Stellenbosch L Rev 351; [Former Deputy Chief Justice of the Constitutional Court] D. Moseneke, “Transformative Constitutionalism: its Implications for the Law of Contract” (2009) 20 Stellenbosch L Rev 3.

In my view, an appropriate method of pegging a minimum standard of good faith should be a contextual one, residing in the study of contract practice. It can also implicate community mores at the micro-level. Given the emphasis on indigenous values present in modern South African contract law, an appropriate standard of fair dealing could be sought in both the refined interior of a plush Johannesburg boardroom, as well as the more vibrant setting of the popular economy of one of South Africa's many urban "townships".¹¹ Here we may refine our approach to fair dealing, from one termed "good faith" to a new concept of "ubuntu". Whether the same standard should apply to boardroom conduct dealing with transactions between companies as applies to transactions between natural persons, is an important element of this standard setting exercise in my view.

The article will proceed as follows: In the next part II, I will set out the relevant black letter law on good faith and other standard-setting open norms in South African contract law. I will unpack the relevant concepts very briefly and give a picture of the historical context and development of the law. In part III, there will be a sharp turn to a different South African business context: I will draw on social science materials from various disciplines to set out an argument as to the nature of ubuntu in the popular economy. In part IV, I will return to positive law, building on parts II and III on South Africa to inform a comparative engagement with the Canadian *Bhasin* case. I will argue that commercial practice from all business contexts should inform commercial law, and in different context-sensitive ways. I will also attack the utopian idealism which

¹¹ A legacy of the spatial separation of communities along racial lines under Apartheid is the separate, largely indigenous African settlements on the edges of most South African towns (or in pockets of land within cities which were designated for African settlement by urban planners of the former era). Despite democracy and universal enfranchisement, economic inequality along racial lines is a continuing South African reality. Thus these townships, often including both formal housing and informal settlements, remain largely populated by black South Africans.

South African courts are developing around the concept of ubuntu in contract. My aim is to argue against a blunt and reductive judicial discretion to intervene in contractual relations. In part V, I will conclude.

II. GOOD FAITH IN THE SOUTH AFRICAN COMMON LAW OF CONTRACT:

A Narrative Account

“The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law.”¹²

The South African common law of contract is a blend of uncodified Roman Dutch law and English law.¹³ This is the historical legacy of two successive colonial powers. When one refers to the “common law of contract” in South Africa, one refers not just to the branch of the law made by the courts, but also to the underlying sources of the old Roman Dutch authorities, which remain a binding source of law.¹⁴ The common law edifice built during the twentieth century in South Africa has increasingly come under attack in contemporary times. Some scholars view the common law as a repository of antiquated values, crafted through a process of formalism to entrench inequalities in society, including those based on race.¹⁵

¹² *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) [23] (Yacoob J for the minority).

¹³ Zimmermann, “Good Faith and Equity” (n 7) 217; H.R. Hahlo & E. Kahn, *The South African Legal System and its Background* (Juta 1968) 585-586.

¹⁴ Hahlo & Kahn, *The SA Legal System* (n 13) 585-86; F. du Bois (ed), *Wille’s Principles of South African Law* (9th edn, Juta 2007) 64-67.

¹⁵ See also M. Chanock, *The Making of South African Legal Culture 1902-1936* (CUP 2001); D. Bhana, “The Role of Judicial Method in Contract Revisited” (2015) 132 SALJ 122; J. Barnard-Naudé, “Of Dorothy’s Dog, ‘Poststructural’ Fairy Tales ... and the Real: Power, Poverty and the General Principles of the South African Law of

Many South African university students hold even more radical views, with “decolonisation” being the current catchword in vogue.¹⁶ Klare’s view¹⁷ that the South African legal system is a product of a conservative legal culture is undoubtedly true, but adherence to the conservative mould is fast going out of fashion in this jurisdiction, including in the courts.¹⁸ Under the banner of “transformative constitutionalism”, another catch-phrase of the democratic era, the Constitutional Court has moved away from formalism to a more substantive, particularist approach to adjudication.¹⁹ This process is supported by a large amount of statute law, which sets up a parallel regime of contracting for consumers, employees, residential tenants, and other weaker parties.²⁰ Through the interpretation of these statutes on the one hand, and the development of the common law of contract itself on the other, the Constitutional Court has begun the process of remodelling South African contract law along grounds perceived to be more just and equitable.²¹

Contract” (2013) 29 SAJHR 469; Klare, ‘Legal Culture and Transformative Constitutionalism’ (n 1) see in particular part III.

¹⁶ For a narrative account of the student protest movement (2015 onwards) see S. Booyesen (ed.), *Fees Must Fall: Student Revolt, Decolonisation and Governance in South Africa* (Wits UP 2016). There is of course a detailed discourse on decolonisation and postcolonial theory: this article will not engage this literature, although the influence of this philosophy is growing rapidly in South African academia.

¹⁷ Klare, “Legal Culture and Transformative Constitutionalism” (n 1) 166-72.

¹⁸ I will give examples of judgments that illustrate this point in what follows. For an academic view, see for example the sources cited in note 15 above.

¹⁹ For a view supporting this process, see Bhana, “The Role of Judicial Method in Contract”. For a note of caution, see M. Wallis, “Commercial Certainty and Constitutionalism: Are They Compatible” (2016) 133 SALJ 545.

²⁰ See eg Consumer Protection Act 68 of 2008; National Credit Act 34 of 2005; Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 75 of 1997; Rental Housing Act 50 of 1999.

²¹ For the leading cases, see *Barkhuizen* (n 7); *Everfresh* (n 12); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC); *Botha v Rich NO* 2014 (4) SA 124 (CC); *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC); *Malan v City of Cape Town* 2014 (6) SA 315 (CC); *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC); *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* (2016) 1 SA 621

A. Historical Background

An detailed legal history of the sources on good faith in South African contract law has been provided by Zimmermann, who traces the development of the doctrine over time in the South African courts up to the date of his publication in 1996.²² As is customary in a South African common law doctrinal history, this narrative begins with Roman law, particularly the procedural device of the *exceptio doli generalis*, which was a defence against fraud under the verbal formulary contracts of classical Roman law.²³ The need for this device died out in the later development of the Roman law of contract by medieval European scholars, however, since with the demise of the strict formulary procedures of Roman contract formation, all contracts were said to rest on a doctrine of good faith.²⁴ This was equally true of historic Roman Dutch law, as a particular national blend of the received Roman law and contemporary Dutch custom.²⁵

This historical background is relevant to South Africa, since during the formative twentieth century period, the prevailing technique of legal development was to search for rules through the study of the Roman Dutch sources.²⁶ As a

(CC); *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC); *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC);

²² Zimmermann, "Good Faith and Equity" (n 7); Hutchison, "Good faith in the SA law of contract" (n 7).

²³ Zimmermann, "Good Faith and Equity" (n 7) at 218-20; Hutchison, "Good faith in the SA law of contract" (n 7) 215-16.

²⁴ Zimmermann, "Good Faith and Equity" (n 7) 218-20; Hutchison, "Good faith in the SA law of contract" (n 7) 215-16.

²⁵ Zimmermann, "Good Faith and Equity" (n 7) 218-20; Hutchison, "Good faith in the SA law of contract" (n 7) 215-16. On the composition of Roman Dutch law itself, see Hahlo & Kahn, *The SA Legal System* (n 13) 514-17.

²⁶ See Hahlo & Kahn, *The SA Legal System* (n 13) 578-96; Chanock, *The Making of SA Legal Culture* (n 15) 12-16 (this is an example of an important general argument throughout Chanock's book). See also the judgments of Joubert JA in *Mutual &*

quirk of South African legal history, the procedural device of the *exceptio doli generalis* was employed occasionally to provide a defence based on equitable grounds – essentially one of “good faith”.²⁷ The device served on several occasions as a doctrinal peg on which to hang a more detailed equitable rule (such as estoppel by representation).²⁸ In only a very limited number of cases, however, was the device itself decisive of the matter at hand, rather than used indirectly to support a more specific rule of contract law.²⁹ In the last case in this line, *Bank of Lisbon v De Ornelas*, the then apex Appellate Division cut short this development by pointing out that the use of the *exceptio doli generalis* in South Africa was not based on historically sound credentials, and then went on to excise this defence from South African law as a “defunct anachronism”.³⁰

One year later in 1989, the Appellate Division retreated slightly on the question of fair dealing, however, to develop the public policy rule to allow for the control of contract terms deemed “unconscionable” in *Sasfin v Beukes*.³¹ There the court struck down a deed of cession of an individual’s book debts to a bank, since certain unseverable terms therein were found to be contrary to public policy and hence invalid.³² The widely worded powers conferred on the bank were interpreted as

Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A); *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

²⁷ See eg *Weinerlein v Goch Buildings Ltd* 1925 AD 282, 292-293; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) 535ff; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 27-28; *Randbank Ltd v Rubenstein* 1981 (2) SA 207 (W) 214-215.

²⁸ See eg *Connock’s (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) 49. The reception of estoppel and other English law devices is discussed in detail in Zimmermann, “Good Faith and Equity” (n 7).

²⁹ The clearest case in point is *Randbank Ltd v Rubenstein* 1981 (2) SA 207 (W). See also Zimmermann, “Good Faith and Equity” (n 7) 232-36; Hutchison, “Good faith in the SA law of contract” (n 7) 217-22.

³⁰ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 607.

³¹ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7H-9G.

³² *ibid* 18F-19G.

effectively turning the debtor into the slave of the financier.³³ Since *Sasfin*, good faith has largely been side-lined in the leading judgments, with public policy being developed as the relevant equitable rule instead.³⁴ This meant, however, that the law focused on illegality/unconscionability to control contracting ex post, rather than enforcing an ex ante and continuing standard of good faith conduct at all stages in the contracting process.

Support for a separate doctrine of good faith lived on in South Africa despite the Appellate Division's conservative position and this term began to creep back into the law reports in the late 1990s and early 2000s.³⁵ Once again, the Supreme Court of Appeal halted this development in *Brisley v Drotsky* in 2002.³⁶ The court stressed there that good faith was not an independent cause of action on which to attack contractual behaviour and that at most it was an underlying value, given effect to by other more technical doctrines:

What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has

³³ *ibid* 13H.

³⁴ Zimmermann, "Good Faith and Equity" (n 7) 258-60; Hutchison, "Good faith in the SA law of contract" (n 7) 222-26. See also the discussion of *Barkhuizen* (n 7) which follows in part II.B below.

³⁵ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* NO 1997 (4) SA 302 (SCA), see the minority judgment of Olivier JA; *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C); *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C); *Miller & Another NNO v Dannecker* 2001 (1) SA 928 (C).

³⁶ *Brisley v Drotsky* 2002 (4) SA 1 (SCA). The "Appellate Division" was rebranded the "Supreme Court of Appeal" under the Constitution of the Republic of South Africa, 1996.

a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one.³⁷

The *Brisley* case concerned a non-variation clause in a contract of residential lease. One of the terms entrenched thereby was a right of the landlord to terminate the contract for late payment of the rent. In the subsequent eviction proceedings, the defendant tenant alleged that the plaintiff landlord had orally agreed to a variation of the due date for payment and that he was as a result acting in bad faith in relying on the non-variation clause in the contract (which required all variations to be in writing and signed by both parties). This argument was dismissed by the SCA and an eviction order was made:³⁸ the argument based on good faith, as quoted above, proved unsuccessful.³⁹ A string of conservative decisions followed from the Supreme Court of Appeal, confirming that good faith was only an underlying value and not a ground on which to attack contractual conduct.⁴⁰ At the time, the Supreme Court of Appeal was the apex court in commercial (that is, non-constitutional) matters.⁴¹

³⁷ 2002 (4) SA 1 (SCA) [22]. Here the court cited with approval D. Hutchison, "Non-variation clauses: any escape from the *Shifren* straitjacket?" (2001) 118 SALJ 720, 744.

³⁸ *Brisley v Drotosky* 2002 (4) SA 1 (SCA) [46]-[47].

³⁹ *ibid* [11]-[34].

⁴⁰ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *South African Forestry Co Ltd v York Timber Ltd* 2005 (3) SA 323 (SCA); *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA); *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA); *Potgieter v Potgieter NO and Others* 2012 (1) SA 637 (SCA).

⁴¹ Since the enactment of the Constitution Seventeenth Amendment Act, in force since August 2013, the Constitutional Court is now the apex court in all matters. Prior to this, parties had to raise a constitutional argument in order for the Constitutional Court to exercise jurisdiction over a claim. For judicial discussion, see *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) [12]-[19].

*B. The Constitutionalisation of Contract Law*⁴²

In the light of the Supreme Court of Appeal's conservative stance in the early to mid- 2000s, it remained to be seen how the Constitutional Court would approach the common law of contract, given its mandate of transformative constitutionalism. The *Barkhuizen v Napier* decision handed down in 2007 was the first Constitutional Court pronouncement on this issue.⁴³ The case dealt with a challenge to a contract term perceived to be an infringement of a constitutional right. This term reflected a 90-day time bar clause in an indemnity insurance contract entered into between an insurer and a natural person. The challenge rested on the constitutionally enshrined right of access to a court. After much discussion, the majority dismissed the challenge on the basis of insufficient evidence.⁴⁴ *Barkhuizen* remains fundamental in modern South African contract law, however, since it set the blueprint as to how to test the validity of contract terms, or the enforcement thereof, against the Constitution.⁴⁵

Following *Barkhuizen*, constitutional rights in South Africa apply through a process of indirect horizontality to contracts: public policy is the vehicle which intermediates the application of the Bill of Rights, setting up a doctrine akin to unconscionability:

⁴² By this concept I intend to describe the process by which the South African law of contract is being developed to better give effect to the rights in the Bill of Rights, as well as related underlying constitutional values (such as ubuntu). The South African Bill of Rights is horizontally applicable, albeit indirectly, and includes socio-economic rights in addition to the conventional civil and political rights. The resultant construct is a judicially 'transformed' law of contract, hence 'constitutionalisation of contract law' and 'constitutional contract law'. Further details appear in what follows.

⁴³ *Barkhuizen* (n 7).

⁴⁴ *ibid* [84]-[89].

⁴⁵ This key additional element of a judicial discretion not to enforce otherwise acceptable contracts is discussed in *ibid* [56].

Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. ...Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it.⁴⁶

This role for an unconscionability (or even just fairness) rule on the basis of which to determine contractual disputes adds another layer of complexity to the question of good faith in contract law: the constitutionally informed notion of public policy takes up most of the available space in the standard-setting process for contractual behaviour. What additional role good faith can play remains a little uncertain, outside of the limited default position described above.⁴⁷ With some circumspection, the majority judgment held as follows on the question of good faith:

The requirement of good faith is not unknown in our common law of contract. It underlies contractual relations in our law. ...As the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance, good faith is given effect to by the existing common law rule that contractual clauses that are impossible to comply with should not be enforced. To put it differently: "Good faith . . . has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contracts." Whether, under the Constitution, this limited role for good faith is appropriate ...to give effect to the value of

⁴⁶ *ibid* [28]. See further L.F. Van Huyssteen, G.F. Lubbe & M.F.B. Reinecke, *Contract: General Principles* (5th edn, Juta 2016) 11-18.

⁴⁷ As part of this process, good faith would also underlie the application of the public policy rule. See Hutchison, "Good faith in the SA law of contract" (n 7) 222-26.

good faith are, fortunately, not questions that need be answered on the facts of this case and I refrain from doing so.⁴⁸

Several other cases from the Constitutional Court have followed, establishing a line of constitutional contract law decisions.⁴⁹ Most of these concerned statutes protecting weaker parties,⁵⁰ or specific areas of contracting, such as commercial credit agreements⁵¹ and agency.⁵² There has been a great deal of transformative emphasis in this line of cases, but the exact status of the common law duty of good faith remains clouded.

Another detailed discussion of good faith in contract from this subsequent line of cases is the decision in *Botha v Rich NO*.⁵³ The case concerned an action for transfer of immovable property by a plaintiff who had entered into an agreement to purchase that property on instalments. This was a situation which the Alienation of Land Act⁵⁴ expressly addressed.⁵⁵ The plaintiff buyer had paid enough instalments to demand transfer in terms of the statute, but the defendant trust alleged that it had validly cancelled the contract at a prior date. The Constitutional Court ordered transfer of the property, thereby overturning the cancellation, but also granted a reciprocal remedy to the seller to withhold transfer until a mortgage had

⁴⁸ *Barkhuizen* (n 7) [80]-[82] (edited and footnotes removed).

⁴⁹ See the list of cases in (n 21) above.

⁵⁰ See eg *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC) on the National Credit Act 34 of 2005; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) on the Rental Housing Act 50 of 1999; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) on the Housing Consumers Protection Measures Act 95 of 1998.

⁵¹ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC), which concerned the *in duplum* rule (which places a cap on the extent to which interest may accrue on an outstanding capital debt).

⁵² *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC), which concerned ostensible authority in the law of agency.

⁵³ *Botha* (n 21).

⁵⁴ Act 68 of 1981.

⁵⁵ See *ibid* section 27.

been registered over the land in its favour.⁵⁶ In discussing reciprocity and its links to good faith, the court said the following:

[T]he concepts of justice, reasonableness and fairness historically constituted good faith in contract. The principle of reciprocity originated in these notions. ...Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way. In this case, good faith is given expression through the principle of reciprocity...⁵⁷

C. Indigenous Law

As to diversity and the role of indigenous law and values, the original *Barkhuizen* decision included reference to indigenous law by employing the South African value of ubuntu, but as part of the definition of public policy, rather than good faith:

Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu.⁵⁸

Ubuntu was listed as a constitutional value in the interim Constitution, which was in force during the transition to democracy in South Africa, prior to the final Constitution

⁵⁶ *Botha* (n 21) [47]-[49].

⁵⁷ *Botha* (n 21) [45]-[46].

⁵⁸ *Barkhuizen* (n 7) [51].

coming into force.⁵⁹ Reference to the concept was omitted from the final Constitution, however.⁶⁰ Nevertheless, ubuntu crops up time and again in Constitutional Court judgments and has been used in several different areas of the law, such as: criminal law (outlawing the death penalty),⁶¹ defamation (in a dissenting judgment, arguing for an apology to serve as a remedy),⁶² and (as above) in contract.⁶³ A general definition of the concept has been offered at various times by both scholars and the judiciary.⁶⁴ Emeritus Constitutional Court justice Mokgoro defined the concept in an often quoted article (written in her personal capacity) with reference to a traditional South African saying, “ubuntu ngumuntu ngabantu”, which she translates as “a human being is a human being through other human beings”.⁶⁵ Mokgoro adds further: “the individual’s existence and well-being are relative to the group”.⁶⁶

Ubuntu in contract law was controversially discussed by the Constitutional Court in *Everfresh* in 2011.⁶⁷ There a landlord sought the eviction of a tenant from commercial premises. The original contract of lease had included a right of renewal for a

⁵⁹ “Preamble” to Act 200 of 1993.

⁶⁰ Constitution of the Republic of South Africa, 1996. See T.W. Bennett, ‘Ubuntu: An African Equity’ in F. Diedrich (ed), *Ubuntu, Good Faith & Equity* (Juta 2011) 3, 5.

⁶¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁶² *Dikoko v Mokhatla* 2006 (6) SA 235 (CC). See the separate minority judgments of Mokgoro J [68]-[70] and Sachs J [105]-[121].

⁶³ For an inventory of the uses of this concept see H. Keep & R. Midgley, “The Emerging Role of ‘Ubuntu-Botho in Developing a Consensual South African Legal Culture” in F. Bruisma and D. Nelken (eds), *Explorations of Legal Cultures* (Elsevier 2007) 29.

⁶⁴ See eg *Everfresh* (n 12) [71] (discussed below); Y. Mokgoro, “Ubuntu and the Law in South Africa” (1998) 4 BHRLR15; D. Cornell & N. Muvangua (eds), *Ubuntu and the Law* (Fordham University Press 2012); Diedrich, *Ubuntu, Good Faith & Equity* (n 60); T. Bennett, *Ubuntu: An African Jurisprudence* (Juta 2018).

⁶⁵ Mokgoro, “Ubuntu and the Law in South Africa” (n 64) 15-16.

⁶⁶ *ibid* 16.

⁶⁷ *Everfresh* (n 12) [71]-[72].

further term, subject to agreement on the appropriate rental. The tenant argued that this clause imposed a duty on the landlord to negotiate the rental amount with it, and that this duty was based in good faith and required a constitutionally informed development of the common law.⁶⁸ The tenant was unsuccessful in the High Court with this argument, and leave to appeal to the Supreme Court of Appeal was denied.⁶⁹ The Constitutional Court agreed to hear the matter, but leave to appeal was in the end denied there by the majority too, on the basis that a defence based on the constitutional development of the common law was raised in that court for the first time.⁷⁰ Despite dismissing the appeal, the majority made several strong obiter statements that they felt that there may indeed be a duty to negotiate here and that this would be based on ubuntu.⁷¹ They offered the following definition of ubuntu to serve in this contractual context:

Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and “carries in it the ideas of humaneness, social justice and fairness” and envelopes “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.⁷²

This decision caused much angst in commercial circles, as it seemed to undermine settled practice that agreements to agree were unenforceable on the ground that they lacked

⁶⁸ *ibid* [13]-[16].

⁶⁹ *ibid* [10]-[12].

⁷⁰ *ibid* [63]-[67].

⁷¹ *ibid* [71]-[72].

⁷² *ibid* [71] (Moseneke J).

certainty (unless a deadlock-breaking mechanism such as an arbitration clause was inserted).⁷³ To compound this angst, the term “ubuntu” seemed to many commercial practitioners to be too broad and vague to allow for clients to be advised *ex ante*.⁷⁴

D. *The Status Quo*

Where does that leave the notional concept of fair dealing and appropriate contractual behaviour in positive South African law? The answer is in a state of flux. There appear to be varying judicial interpretations of the current law, possibly due to the seemingly broad powers of judicial discretion created by the Constitutional Court’s pronouncements thus far.⁷⁵ At High Court level, there are several instances reported in the last two years of the Constitutional Court’s position being interpreted as a licence to exercise a blanket judicial discretion on equitable grounds. In the 2017-2018 period, I have been able to source four such reported decisions,⁷⁶ of which I will discuss one in particular: *Mohamed’s Leisure Holdings*.⁷⁷

⁷³ Wallis, “Commercial Certainty and Constitutionalism” (n 19) 557-61.

⁷⁴ *ibid* 560. Wallis’s argument here is general: he asks what role the definition of ubuntu cited in *Everfresh* above can have in framing a relationship between artificial persons.

⁷⁵ For published opinions supporting this view, the personal writing of certain Supreme Court of Appeal justices refers: Wallis, “Commercial Certainty and Constitutionalism”; F.D.J. Brand, “The role of good faith, equity and fairness in the South African law of contract: A Further Instalment” (2016) 27 Stellenbosch L R 238; C. Lewis, “The uneven journey to uncertainty in contract” 2013 (76) THRHR 80.

⁷⁶ *Bondev Midrand (Pty) Ltd v Madzhie and Others* 2017 (4) SA 166 (GP); *Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ); *Roazar CC v The Falls Supermarket CC* 2017 (2) All SA 665 (GJ); *Beadica 231 CC v The Trustees for the Time Being of the Oregon Trust* (IT728/1995)2018 (1) SA 549 (WCC).

⁷⁷ *Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ).

In *Mohamed's Leisure Holdings*, the applicant landlord had exercised a contractual right to cancel a commercial lease due to the late payment of rent and sought eviction of the tenant as a consequence thereof. In brief, the facts were that the tenant, Southern Sun, was operating an hotel business in a building owned by the landlord, Mohamed's Leisure Holdings. Rent was due by the seventh day of each month and the contract contained an express cancellation clause permitting the landlord to terminate the contract in the event of late payment of the rent. The tenant paid late in June 2014, through an error of its bank alone and in circumstances where there was no shortage of available funds. As soon as the error was discovered, the tenant immediately instructed its bank to pay the landlord. The landlord accepted the late payment, but advised the tenant in writing that a future late payment would be met with immediate cancellation of the contract. In July, August, and September, the tenant monitored its account closely and payment was in each case made on time. In October, however, rent was again not paid by the due date, a fact which went undetected by the tenant. The landlord thereafter gave notice in writing to the tenant that it had cancelled the contract. The tenant immediately tendered payment in full plus interest, but this was rejected by the landlord.

In the High Court it was held that this was a situation of "demonstrable unfairness"⁷⁸ to the tenant and that as a result, the principle of sanctity of contract should be relaxed:

Applying the value of ubuntu, "carrying with it the ideas of humaneness, social justice and fairness" (*Everfresh* para 71), to the facts of this matter, finally leads me to conclude that an order for the eviction of the respondent, as sought by the

⁷⁸ *ibid* [35].

applicant, would offend the values of the Constitution..., and that the application must accordingly fail.⁷⁹

On appeal to the Supreme Court of Appeal this decision was overturned.⁸⁰ The Supreme Court of Appeal began by noting that the *Barkhuizen* public policy test evaluated not only the terms of the contract itself, but also the effect thereof, which facilitated a more purposive approach to ensure a substantively fair outcome.⁸¹ Immediately thereafter the court discussed the importance of the principle of sanctity of contract, however.⁸² It also stressed the facts that: (a) the contract terms themselves were not unreasonable; (b) there was more or less an equality of bargaining power between the parties; and (c) that performance on time was not impossible: the tenant could easily have monitored its own bank.⁸³ In sum, contractual sanctity had to outweigh a public policy-based fairness argument.⁸⁴ An order of eviction was granted.⁸⁵

The Supreme Court of Appeal's decision, handed down by a fresh and representative bench of judges, reflects the old conservatism of 2002 and indeed of 1988.⁸⁶ This finding will now bind lower court decisions unless and until the Constitutional Court rules otherwise and should inject a

⁷⁹ *ibid.*

⁸⁰ See in addition, the overturning of a similar finding at High Court level by the Supreme Court of Appeal in *Roazar CC v Falls Supermarket CC* [2018] 1 All SA 438 (SCA).

⁸¹ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) 15.

⁸² *ibid* [22]-[27].

⁸³ *ibid* [28].

⁸⁴ *ibid* [28]-[31].

⁸⁵ *ibid* [33]-[34].

⁸⁶ None of the justices of appeal listed in note 75 above were part of the bench. The unanimous judgment was authored by Mathopo JA. In *Roazar CC v Falls Supermarket CC* [2018] 1 All SA 438 (SCA), the unanimous judgment, which was also stressed freedom of contract over fairness, was delivered by Tshiqi JA.

measure of legal certainty into an otherwise murky area. Will the Constitutional Court adhere to this conservative interpretation of its judgment in *Barkhuizen*? The previous track record of this court suggests that a legal commentator must navigate with caution in answering this question: a clear ruling by the Constitutional Court is needed and preferably sooner rather than later. If the Supreme Court of Appeal's interpretation is confirmed, this will considerably reduce the scope for arguments based on fairness, ubuntu, or good faith in future cases.

Regardless of the ultimate role determined for such open norms, however, these need to be clearly defined. In the following part III I argue for a tighter and more commercially sensitive understanding of ubuntu in contract. A broader approach to defining both ubuntu and good faith will be discussed further in part IV.

III. INDIGENOUS BUSINESS VALUES: LAW IN CONTEXT

Legal development is an especially political process in South Africa and in contract there are different views on the correct path to follow going forward. This is true not only of the academic discourse, but also of reported judgments. As discussed above, however, the ideological trajectory of transformative constitutionalism in the Constitutional Court has been towards protecting weaker parties. One way of doing this is by imposing a duty of social responsibility onto contracting parties. This could also be phrased as a role for community. From an African perspective specifically, there is a detailed published discourse on the role of community in framing social norms.⁸⁷ Discussion topics include so-called African socialism, which can be contrasted with a more

⁸⁷ Compare for example K. Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (OUP 1997) ch 2 & 5. In South Africa the discourse on ubuntu, such as in the sources cited in note 64 above refers.

moderate notion of community as argued for by Gyekye for example.⁸⁸ In South Africa, the governing norm is ubuntu.

Finding a role for community in contracting seems a far cry from the more individualist attitudes of the average liberal market economy based on the protection of private property.⁸⁹ Although both contract and economic theory have come a long way since the zenith of freedom of contract and laissez-faire market regulation, it is still a long shot to say that contract practice is characterised by communal solidarity in most parts of the world.⁹⁰ Indeed, as *Bhasin* put it with regard to Canada, good faith does not comprise a duty of “fiduciary loyalty” to an opposing party.⁹¹ One way to resolve this perceived gap between “Western” and “African” norms, would be to consult indigenous business law to see how it reconciles the notion of community with the commercial needs of the marketplace. No such legal discourse exists, however, at least not in South Africa’s written sources of law.⁹² Chanock’s alternative history of South African law suggests that the reason for this lacuna was the deliberate strategy by past colonial and white minority administrations to undermine the participation of indigenous Africans in the economy; except in subordinate roles, such as

⁸⁸ In his *Tradition and Modernity*, Gyekye defends a view that African socialism as practiced in some African states in the post-colonial era should not be the favoured vehicle for the notion of community. Gyekye prefers a more moderate view of community which leaves room for the individual. *ibid* chs 2 & 5.

⁸⁹ cf C. Fried, *Contract as Promise* (2nd edn, OUP 2015).

⁹⁰ This is despite the trajectory of the argument in P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979). Atiyah himself addressed the theme of neoliberalism in: P.S. Atiyah, “Contract Law and the New Right” in P.S. Atiyah, *Essays on the Law of Contract* (OUP 1986) 355.

⁹¹ *Bhasin* (n 8) [86].

⁹² A perusal of the leading texts will confirm this view: although some may contain a chapter on contracting, these are not commercial contracts, but relate largely to the family or broader community. Compare for example: C. Himonga & T. Nhlapo (eds), *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (Juta 2014); C. Rautenbach & J.C. Bekker, *Introduction to Legal Pluralism* (4th edn, Durban, 2014).

labourers, debtors, and consumers.⁹³ The political position of indigenous South Africans has changed in South Africa, but economically, society still remains largely stratified by race, with the legacy of the policies Chanock describes still very much present today.⁹⁴ Ideologically then, there is a desire to transform the law to a synthesis more reflective of the heritage of broader South African society.⁹⁵

What I will do in the rest of this part III is to defend a view that despite this necessary political process towards developing a greater role for indigenous law and values, including in the commercial sphere, the development of contract law and other areas concerned with business activity should not deviate from the needs of sound commercial practice. I will do this by unpacking the role of community in a common type of indigenous commercial structure: the popular economy financial mutual known here as a “stokvel”. The operation of the mutual (from here on I will use the vernacular term *stokvel*) is based on contract, but is largely unregulated by the formal law. First, however, I will describe a context for this argument.

A. *The Popular Economy*

On the periphery of South Africa’s urban centres there is usually an indigenous African township (itself often a legacy of “spatial Apartheid”). This type of locus has been described as possessing a “popular economy”: a marketplace at the

⁹³ Chanock, *The Making of SA Legal Culture* (n 15). This argument is a central narrative thread of the whole book, but see in particular part IV, especially chs 13-14.

⁹⁴ From a social science perspective see for example: J. Seekings & N. Nattrass, *Class, Race and Inequality in South Africa* (Yale 2005). For a discussion of the relationship between law, race and poverty, see J. Modiri, “Law’s Poverty” (2015) 18 PELJ 224.

⁹⁵ As an example of this zeitgeist, see *Everfresh* (n 12) [23], which was cited and discussed in part II above.

intersection of the formal and informal economies.⁹⁶ Much commercial activity goes on here, largely of the informal variety. From a commercial point of view, the formal sector penetrates the popular economy too, however, through (for example) interaction with formal sector retail businesses, with banks, with formal sector micro-lenders, with insurers, and through the social assistance measures provided by the State.⁹⁷ That is not the full financial picture, however, since the informal economy is also home to illegal loan sharks,⁹⁸ various types of savings and credit stokvels,⁹⁹ burial societies,¹⁰⁰ spaza shops and other informal traders.¹⁰¹ Sometimes the formal and informal

⁹⁶ See for an introduction: Hull & James, "Introduction: Popular Economies in South Africa" (n 3). Other sources will appear in the notes below.

⁹⁷ This interaction between the formal and informal sectors is a defining feature of the discourse on the popular economy. In A. Hutchison & N. Sibanda, "A Living Customary Law of Commercial Contracting: Some Law-Related Hypotheses" (2017) 33 SAJHR 380, we unpack this feature of the relevant literature from a legal perspective.

⁹⁸ Also known in South Africa as "*mashonisa*": P. Mashigo, "The lending practices of township microlenders and their impact on the low income households in South Africa: A case study for Mamelodi township" (2012) 65 *New Contree* 23; J. Roth, "Spoilt for Choice: Financial Services in a South African Township" (PhD thesis, University of Cambridge 2004) ch 4.

⁹⁹ For South Africa see G. Verhoef, "Informal Financial Service Institutions for Survival: African Women and Stokvels in Urban South Africa, 1930-1998" (2001) 2 *Enterp & Soc* 259; D. James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (Stanford, 2015) ch 4; W.G. Schultze, "The Origin and Legal Nature of the Stokvel" (Parts 1&2) (1997) 9 SA Merc LJ 18; 153; P. Mashigo & C. Schoeman, "Stokvels as an Instrument and Channel to Extend Credit to Poor Households in South Africa" (2012) 5 JEF 49.

¹⁰⁰ R.J. Thomson & D.B. Posel, "The Management of Risk by Burial Societies in South Africa" (2002) 2 SAAJ 83.

¹⁰¹ The Socio-Economic Rights Institute (SERI – an independent South African NGO) has made this one of their special projects, see the publications on their website, for example: D. Webster, "'The End of the Street?' Informal Traders' Experiences of Rights and Regulations in Inner City Johannesburg" (2015) <http://www.serisa.org/images/Seri_informal_traders_report_FINAL_FOR_SIG_N_OFF_2.pdf> (accessed 16 February 2018). See further: M. Pieterse, "Rights, regulation and bureaucratic impact: the impact of human rights litigation on the regulation of informal trade in Johannesburg" 2017 (20) PELJ 1.

are mixed, such as when a salary earned in the formal sector is used as capital in an informal venture.¹⁰²

The formal sector may bring with it a set of legal norms and regulations laid out in a sophisticated myriad of financial and consumer statutes, but the legal system does not always completely reach into the informal economy.¹⁰³ Sometimes, the informal financial sector is formally excluded from legislation.¹⁰⁴ Then, because of issues of access to justice and distrust of the legal system, it is also here that indigenous business is carried on in a largely privately ordered system of norms, rather than (necessarily) according to the positive legal norms of the central state.¹⁰⁵

The South African popular economy has been the subject of many empirical studies by social scientists and hence there is a good deal of data from which to hypothesise about the content of ubuntu in modern indigenous commercial practice. This allows for the development of a grounded theory¹⁰⁶ of ubuntu, which is in my view more accurately pitched than the individual worldview portrayed in a curial judgment. Of course, a full grounded theory would require a comprehensive

¹⁰² This issue is unpacked in Hull & James, "Introduction: Popular Economies in South Africa" (n 3) 7-10.

¹⁰³ See Rautenbach & Bekker, *Introduction to Legal Pluralism* (n 92)15-16, who refer to a concept of a "people's law", distinct from living customary law and the common law. See further G. Super, "Volatile Sovereignty: Governing Crime through the Community in Khayelitsha" (2016) 50 *Law & Soc'y Rev* 450; S. Burman & W. Schärf, "Creating People's Justice: Street Committees and People's Courts in a South African City" (1990) 24 *Law & Soc'y Rev* 693.

¹⁰⁴ The National Credit Act 34 of 2005 expressly excludes from its ambit a "transaction between a stokvel and a member of a stokvel in accordance with the rules of that stokvel" in section 8(2)(c). The term "stokvel" is defined in detail in section 1 of that Act.

¹⁰⁵ An narrative account of the social circumstances in a South African township, reflecting lack of access to justice and a resultant necessity for private ordering can be found in E. Bähre, *Money and Violence* (Brill 2007).

¹⁰⁶ M.Q. Patton, *Qualitative Research and Evaluation Methods: Integrating Theory and Practice* (4th edn, Sage 2015) 98, 288-89.

dedicated survey, which I have not done.¹⁰⁷ Still the available materials of both a qualitative¹⁰⁸ and quantitative¹⁰⁹ nature provide enough data to allow for saturation of the accounts: indeed certain features of these studies are recurrent, a trend which immediately strikes the reader thereof. One of the predominant such features is the role of community in popular economy business practice.

B. An Appropriate Theory of Contracting

First, however, we need a theory of contracting which is able to operate as a normative process without reference to the courts. The socio-legal literature on contracting is extensive and provides a readily available terminology for this exercise. Relational contract theory has shown that the actual terms of a given contract, whether written or oral, are only part of the picture.¹¹⁰ A full account of a contractual relationship must also explain the nature and extent of the human connectivity between the parties, as well as their underlying economic wants and needs.¹¹¹ Both contracts in the popular economy and in the formal economy are concluded through human agency; and economics is the driver of commercial activity. Together these two additional dimensions of a contractual relation add to the

¹⁰⁷ I am, however, in the process of conducting a localised, qualitative study of contracting norms in stokvels in Khayelitsha, Cape Town.

¹⁰⁸ The sources in notes 98-100 above are largely qualitative.

¹⁰⁹ An example of a quantitative study is the research paper by African Response, "Stokvels – A hidden economy: unpacking the potential of South African traditional savings schemes" (2012), available at: <https://www.africanresponse.co.za/assets/press/2012StokvelHiddenEconomy.pdf> (accessed 15 February 2018).

¹¹⁰ See I.R. Macneil, "The Many Futures of Contracts" (1974) 47 S Cal L Rev 691; S. Macaulay, "Non-contractual Relations in Business – A Preliminary Study" (1963) 28 Am Soc Rev 55.

¹¹¹ This "three-dimensional" view of a contractual relation is clearly set out in Collins, *Regulating Contracts* (OUP 2002) 128-32.

formal terms of the contract and allow for non-legal sanctions¹¹² to be brought to bear on a recalcitrant opposing party. These may be of the social variety (such as reputational impairment) or of the economic kind (such as refusing to do repeat business, or using market leverage to force compliance).¹¹³ In the informal economy there is also the possibility of self-help of various sorts, particularly if formal sector law enforcement does not fully penetrate the community to prevent this.¹¹⁴ Through human interaction, underpinned by non-legal sanctions, it is thus possible to create a privately ordered¹¹⁵ system of contracting.

While there might be informal community tribunals dispensing summary justice,¹¹⁶ it is largely through peer pressure and non-legal sanctions that compliance is achieved in the popular economy business realm.¹¹⁷ I have discussed these features at length in a separate article co-written with Sibanda.¹¹⁸ What I will expand upon here, however, is the role which community (or ubuntu) can play in this matrix. I will do this through an anecdotal process, using as my example a common form of popular economy commercial activity, namely the stokvel.

¹¹² D. Charny, "Nonlegal Sanctions in Commercial Relationships" (1990-91) 104 Harv L Rev 373.

¹¹³ *ibid* at 392-397. See further Collins, *Regulating Contracts* (n 111) ch 5-6.

¹¹⁴ Roth, "Spoilt for Choice" (n 98) discusses this aspect at ch 4, with reference to the transaction costs involved in this process. See further Bähre, *Money and Violence* (n 105) 83-84, 132-140.

¹¹⁵ For an overview of the "private ordering" literature, see B.D. Richman, "Firms, Courts and Reputation Mechanisms: Towards a Positive Theory of Private Ordering" (2004) 104 Colum L Rev 2328.

¹¹⁶ See Super (n 103); Burman & Schärf (n 103); Rautenbach & Bekker, *Introduction to Legal Pluralism* (n 92) 15-16.

¹¹⁷ This was our hypothesis in Hutchison & Sibanda, "A Living Customary Law of Commercial Contracting" (n 97) where we applied the private ordering thesis to the empirical findings of popular economy scholars.

¹¹⁸ Hutchison & Sibanda, "A Living Customary Law" (n 97).

C. Stokvels: Contractual Ubuntu in Action?

There are various types of stokvel: the literature distinguishes “rotating savings and credit associations” (“ROSCAs”) (which have primarily a savings function, where regular contributions are made to a communal pool, which is then taken in turns by a member of the group according to a predetermined roster)¹¹⁹ from “accumulated savings and credit associations” (“ASCRA”). (In an ASCRA, the periodical individual contributions to a joint pool by each member are simultaneously paid out at a pre-specified maturity date. This format involves saving through individual member contributions, along with the growth of a pool of capital. The pooled resources may be increased through the lending of this capital to members at interest).¹²⁰ The quantitative sources on stokvels describe a vast amount of financial resources being held and managed through this process, usually with a bank acting as a repository for safety reasons.¹²¹ The qualitative sources paint a picture of regular meetings, which are social events for participants and which allow for a public monitoring process to ensure payment of contributions and to police compliance with the rules of the association.¹²²

A transaction between a stokvel and a member of that stokvel is expressly exempted from the National Credit Act, hence the practices of these associations remain largely

¹¹⁹ Another way of looking at this construct is that an interest free loan is provided to each group member (except the last member of the rotation). This is one reason why this format is chosen over individual savings in a bank account.

¹²⁰ For definitions of the stokvel concept and typologies, see Verhoef, “Informal Financial Service Institutions” (n 99); Schultze, “The Origin and Legal Nature of the Stokvel” (n 99) 25-26; Mashigo & Schoeman, “Stokvels” (n 99) 54-56. For a reported South African case describing the functioning of an ASCRA, see *Mndi v Malgas* 2006 (2) SA 182 (E).

¹²¹ African Response, “Stokvels – A Hidden Economy” (n 109) 6.

¹²² Verhoef, “Informal Financial Service Institutions” (n 99) 263-64, 73-74; Schultze, “The Origin and Legal Nature of the Stokvel” (n 99) 25.

unregulated.¹²³ This means that compliance with the rules of the stokvel must be ensured through non-legal means. Here the sources speak to the heavy weight attached to reputation in a group whose members are screened before joining by existing participants, and who are usually well known to one another as members of the same community.¹²⁴ Default will lead to a loss of face in the community; an end to a line of available credit; and possibly also (illegal) forms of self-help debt execution by the group.¹²⁵

What role does community play here then? The advantage of membership of a stokvel is that a stokvel will extend credit to a community member when she needs it – for school fees, funeral costs, or other unanticipated expenditures.¹²⁶ This services a need for micro-loans for those who may have an impaired credit record in the formal sector, or insufficient resources to obtain a loan from a formal sector bank restrained by the rules of the National Credit Act, which prohibit reckless lending.¹²⁷ This is a very important role for community, and indeed one could possibly label this ubuntu if one was of an ideological slant. Bähre speaks strongly against using the term ubuntu, however: his anthropological study found that compliance was achieved through communal mechanisms, which rested on monitoring and social pressure.¹²⁸ A concept of ubuntu in the sense of altruistic permissiveness or

¹²³ Act 34 of 2005, section 8(2)(c).

¹²⁴ Verhoef, "Informal Financial Service Institutions" (n 99) 263; Mashigo & Schoeman, "Stokvels" (n 99) 57. For an anecdotal, empirical account, see James, *Money from Nothing* (n 99) ch 4.

¹²⁵ Bähre, *Money and Violence* (n 105) 132-33. cf Verhoef, "Informal Financial Service Institutions" (n 99) 264, 274-275.

¹²⁶ Bähre, *Money and Violence* (n 105) 136.

¹²⁷ Reckless credit is regulated in chapter 4 part D of the National Credit Act 34 of 2005.

¹²⁸ Bähre, *Money and Violence* (n 105) 133-40.

trust was not supported by his empirical findings.¹²⁹ His account, supported by the omission of the term “ubuntu” in other similar anthropological studies, speaks to the fact that contracts are expected to be upheld, despite the communal setting. The community will help you in your time of need with a loan when no one else will offer you this, but default on the loan will have personal consequences for you as debtor, since this impacts on the financial position of other group members.¹³⁰

Is this moderate community as per Gyekye: private property backed individualism, but tempered by social responsibility?¹³¹ Perhaps, but it is also a survivalist account of a largely self-sustaining group which cannot afford to write off debts. In the same sense of community, sometimes the financial well-being of the majority of the group must outweigh the personal misfortunes of an individual debtor.¹³² Also we are laying the foundations for profit-maximising individualist behaviour, although within the confines of a collective enterprise. In short, we are seeing that the community supplies resources to fill in for the failures of the state-sanctioned system, and self-regulates the allocation thereof. In my view, the stokvel provides an illustration of Gyekye’s theory of moderate community through its example of individualism within a collective structure. We also see here a form of ubuntu which fits the business mould, rather than a utopian ideology which has largely been abstracted from the conventional market forces of commercial reality.

¹²⁹ *ibid.*

¹³⁰ Bähre, *Money and Violence* (n 105) 132-33, 136-40. Compare Verhoef, “Informal Financial Service” (n 99) 272, who also states that there are sanctions for non-compliance, but describes the overall system as one of ubuntu.

¹³¹ Gyekye, *Tradition and Modernity* (n 87) ch 2.

¹³² Compare here the statement of Mokgoro cited above in the text attached to note 66 that individual well-being is relative to that of the group.

D. A Role for Context?

I return now to a question posed in the introduction above: do the same business norms apply in the Johannesburg boardroom as apply at the Khayelitsha¹³³ stokvel's monthly gathering? Does fair dealing and appropriate business conduct transpose seamlessly from one setting to the next? Again, I will draw on relational contract theory to answer this question. Campbell argued in 2014, after good faith in contract was firmly raised in the English jurisdiction, that if there was to be a duty of good faith, it should be given content with regard to the context of the parties' own business dealings, rather than with reference to an exogenous standard.¹³⁴ I myself have argued separately that the Constitutional Court's approach to contract dispute resolution is best analysed through a contextual approach: this allows for a sufficiently nuanced interpretation of an often seemingly *ad hoc* and particularist decision making record.¹³⁵ Contextual reasoning also goes to the heart of the substance over form debate, which has long animated discussions of the protection of weaker parties in contract.¹³⁶ In the same way that studying ubuntu in context allows us to define accurately what this notion means for business conduct in the South African popular economy, one should not forget that ubuntu is also at heart about community, and abstracted from a community setting, ubuntu loses much of its meaning.

¹³³ Khayelitsha is a large township (see note 11 above) 30km outside Cape Town. The population thereof comprises mostly indigenous Africans. Khayelitsha is the location of my own qualitative empirical study, which is currently in progress.

¹³⁴ D. Campbell, "Good Faith and the Ubiquity of the 'Relational Contract'" (2014) 77 MLR 475, 488, 490-492.

¹³⁵ A. Hutchison, "Relational theory, context and commercial common sense: views on contract interpretation and adjudication" (2017) 134 SALJ 296.

¹³⁶ The key text here is D. Kennedy, "Form and Substance in Private Law Adjudication" (1975-1976) 89 Harv L Rev 1685. For a South African perspective, see A. Cockrell, "Substance and Form in the South African Law of Contract" (1992) 109 SALJ 40.

If ubuntu informs public policy, itself a conception of notional community standards, then we are simply redefining who the notional South African community is, or rebranding the concept under an indigenous label.¹³⁷ If, however, ubuntu is intended to convey a positive standard of fair dealing beyond this, to which a party's conduct at all stages of the contracting process must conform and on which grounds an independent challenge not just to the contract terms, but also to the conduct of a party or the process of contracting, then it should not be forgotten that contracting happens in different contexts between different types of parties. Indeed, this is the founding philosophy behind statutes protecting weaker parties in specific contexts, namely that different kinds of contract law are needed. Perhaps as I suggested with Sibanda, we need an additional contract regime dealing specifically with indigenous contract forms,¹³⁸ or perhaps such a system of norms could be included in the existing statutory matrix.¹³⁹

In the Johannesburg boardroom, however, we are likely to find an arms-length transaction between corporates: probably negotiated with legal representation and possibly backed by insurance or collateral of various kinds. If there is a dispute here, it will probably be resolved with reference to the central State-sanctioned legal regime. Should the same standards of market conduct apply as in a system of contracting resting on community-backed private ordering for its existence? One might add the question: who is your notional indigenous "African"? There are many different types of people in South Africa, a fact long recognised in constitutional

¹³⁷ cf Bennett, "Ubuntu: An African Equity" (n 60) 16-19.

¹³⁸ Hutchison & Sibanda, "A Living Customary Law" (n 97) 403.

¹³⁹ Of course, this suggestion ignores various problematic attempts at codifying indigenous law in South, see for example S. Mnisi Weeks & A. Claassens, "Tensions between vernacular values that prioritise basic needs and State versions of customary law that contradict them: 'We love these fields that feed us, but not at the expense of a person'" (2011) 22 Stellenbosch L R 823.

indigenous law.¹⁴⁰ To ascribe one universal “African worldview” to all members of the business community in South Africa sounds a lot like a generalisation, perhaps even cultural relativism.

In the following part IV, I will address the question as to what a market conduct norm should entail.

IV. COMPARATIVE ANALYSIS: DEFINING A DUTY OF GOOD FAITH IN CONTRACT

A. *Good Faith in Bhasin*

From a South African perspective, perhaps the most useful aspect of the *Bhasin* decision is the level of detail in which the role of good faith in contract was unpacked by the Supreme Court. Spanning just over 60 paragraphs of the judgment, good faith is explained in the light of previous Canadian decisions, comparative law, statute law, and academic writing. Proceeding from a summarised claim (which I will repeat) that good faith is an organising principle, which underlies other areas of contract law and which has as a minimum core a standard of honest conduct in the performance of contractual obligations,¹⁴¹ the judgment goes on to explain the context of the operation of this doctrine in Canadian law fully. This bold decision will now aid the development of the law of good faith in contract moving forward.¹⁴² The *Bhasin* findings on good

¹⁴⁰ There a given rule of the “living” customary law may be proven with regard to a particular community where that norm has force of law in a legal pluralism sense. See: *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) [53]; *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) [153].

¹⁴¹ *Bhasin* (n 8) [33].

¹⁴² The academic reception of *Bhasin* has been mixed in Canada: J. McCamus, “The New General ‘Principle’ of Good Faith Performance and the New ‘Rule’ of Honesty in Performance in Canadian Contract Law” (2015) 32 JCL 103, 118 describes

faith may be summed up in a few broad propositions to facilitate comparison with South African law in framing a market conduct standard in contract:

(a) Good faith underlies many elements of modern contract law. It is given effect to through (inter alia) the doctrine of unconscionability; the process of interpretation; and the implication of terms.¹⁴³ These three processes address power imbalances between contracting parties.¹⁴⁴

(b) Good faith also operates as part of the specific rules surrounding certain classes of contracts, in areas such as: insurance; franchises; employment law; and in tendering processes.¹⁴⁵ Here there may be additional duties due to the nature of the contracting process.

(c) Certain contracting contexts (outside of these areas) call for a more nuanced treatment of the duty of good faith, such as: express terms promising cooperation between parties;¹⁴⁶ the fettering of the exercise of a discretionary contractual power assigned to a party;¹⁴⁷ and where one party seeks to evade contractual duties.¹⁴⁸

the case as an “important milestone in the development of the Canadian common law of contract”. A. Swan, “The Obligation to Perform in Good Faith: Comment on *Bhasin v Hrynew*” (2015) 56 Can Bus LJ 395 is also positive and argues that the decision is fairly simple to comply with – contracting parties should not tell each other lies, or sail too close to the wind in contractual dealings. J. Robertson, “Good Faith as an Organizing Principle in Contract Law: *Bhasin v Hrynew* – Two Steps Forward and One Look Back” (2015) 93 Can Bar Rev 809, 860-864 finds a duty of honest performance of contracts to be a development, which is “hardly surprising”, although he disputes the correctness of the way in which this duty was applied to the evidence before the court. A more negative view may be found in C. Hunt, “Good Faith Performance in Canadian Contract Law” (2015) 74 Cambridge LJ 4, 6 who laments the potential inroad into freedom of contract.

¹⁴³ *Bhasin* (n 8) [42]-[45].

¹⁴⁴ *ibid* [43].

¹⁴⁵ *ibid* [46], [53]-[56].

¹⁴⁶ *ibid* [49].

¹⁴⁷ *ibid* [50].

¹⁴⁸ *ibid* [51].

(d) The context of a contractual relation is extremely important in giving content to a duty of good faith in a given situation.¹⁴⁹ Any duties imposed should be drawn from the nature of the relationship between the parties.¹⁵⁰

(e) In general terms, good faith in the performance of a contract requires only honest conduct from a party.¹⁵¹ It does not require that party to put her opponent's interests ahead of her own as per fiduciary duties.¹⁵² Thus, for example, there is no requirement of disclosure beyond those provided for in specific contexts such as insurance law.¹⁵³

(f) The recognition of a duty of good faith performance provides a basis on which to attack contractual conduct.¹⁵⁴ This is by means of a rule of contract law, not through the implication of terms.¹⁵⁵

(g) Freedom of contract is another very important underlying contractual value, as is contractual certainty.¹⁵⁶ A blanket discretion to decide cases on an *ad hoc* basis should not be given to judges.

Another appealing aspect of the *Bhasin* decision is its incrementalism, true to the Common law mould. The propositions above define a role for good faith conduct; yet do so largely with reference to certain particular contexts. A broad general duty of good faith outside of context-defined situations is kept to the bare minimum of honesty in performance. Honesty is an easily defensible minimum standard, in line with the phrase used elsewhere in the judgment of "appropriate

¹⁴⁹ *ibid* [69].

¹⁵⁰ *ibid* [69], [77]-[78].

¹⁵¹ *ibid* [79]-[82].

¹⁵² *ibid* [86].

¹⁵³ *ibid*.

¹⁵⁴ *ibid* [88].

¹⁵⁵ *ibid* [74]-[76].

¹⁵⁶ *ibid* [70]-[71].

regard for the other party's interests".¹⁵⁷ It is certainly not a duty of altruism, nor one of objective reasonableness. With regard to a role for community: this is given effect to through the use of context, including the relational aspect thereof.¹⁵⁸ It is also a standard of community which will underlie the rule prohibiting unconscionable conduct.¹⁵⁹ This role for community values leaves room for a given context to require more from a contracting party, while not imposing an unrealistic burden in adversarial commercial settings. One might indeed say that honesty is the minimum standard which the notion of community imparts in Canada, and that this standard cuts across different categories and contexts of contractual relation.

B. A Uniquely South African Perspective: Comparative Analysis

The South African analysis will deal with the two major propositions of *Bhasin* under separate headings, namely (IV.B.1) "Good faith as organising principle"; and then (IV.B.2) "Where to peg a standard of good faith?" By splitting these issues, I am able to provide a functionalist¹⁶⁰ comparative account, particularly with regard to heading two where South African law speaks with several voices.

1. Good faith as an underlying value in South African contract law

The statement that good faith underlies the technical rules of contract law and is given effect to through their

¹⁵⁷ *ibid* [65], [69].

¹⁵⁸ *ibid* [60]-[61], [69].

¹⁵⁹ The standard referred to in *Bhasin* (n 8) [43] is one of "fairness", but this must be determined on policy grounds, which implies a discretion based on community standards.

¹⁶⁰ The classic proponents of this approach are K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (T. Weir tr, 3rd edn, OUP 1998). See in particular ch 3 on their methodology.

interpolation is equally true of South African law as it is of Canadian law, as reflected in the various dicta cited in part II above. Good faith is similarly used to interpret contracts¹⁶¹ and in the implication of terms.¹⁶² A related general role for good faith is as a doctrinal peg on which to hang new legal developments.¹⁶³ This reflects the Civilian technique of legal development,¹⁶⁴ and also indeed the Supreme Court's approach in *Bhasin*.¹⁶⁵ The unconscionability rule in South African law has also been discussed in detail in part II above. The Constitutional Court has said that the public policy unconscionability test is informed by ubuntu, rather than good faith per se. There is a conceptual overlap between good faith and ubuntu here, which I will unpack in the following part IV.B.2 below.

With regard to specific contracts: here we enter the realm of various detailed statutory and common law regimes – there is a clear role for good faith here, not only in insurance law (as is universal),¹⁶⁶ but also in the detailed “fairness” regimes

¹⁶¹ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) [32]-[36] is a key recent example.

¹⁶² See in particular *Tucker's Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 651E-F. The supplementing of contracts with new terms implied by law is discussed in Hutchison, “Good faith in the SA law of contract” (n 7) 234-36.

¹⁶³ Compare the discussion and examples given in Zimmermann, “Good Faith and Equity” (n 7).

¹⁶⁴ Whittaker & Zimmermann, “Good faith in European contract law: surveying the legal landscape” (n 4) 22-26.

¹⁶⁵ *Bhasin* (n 8) [73]: “Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step.”

¹⁶⁶ *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A); *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 431H-433F.

governing employment,¹⁶⁷ residential leases,¹⁶⁸ contracts between a business and a consumer,¹⁶⁹ or contracts between creditors and consumer debtors.¹⁷⁰ In these statutory regimes, fairness must be both substantive and procedural: there is thus a clearly defined ambit of acceptable market conduct, but this is different to a general duty of good faith in contracting.

Outside of specific classes of contract, as in Canadian law, there are general rules on certain types of contractual clause. Examples would be clauses creating agreements to agree over open terms (the *Everfresh* case discussed in part II above is an example of this).¹⁷¹ Sometimes this type of clause expressly states that the open term is to be “negotiated in good faith” at a future date.¹⁷² More puzzling are terms which expressly call for a duty of “co-operation” or “good faith” in the future performance of a contract: one High Court example dealing with a franchise relationship interpreted this clause as imposing a fiduciary duty on a franchisor not to infringe on the geographical radius of a franchisee.¹⁷³ This case may, however,

¹⁶⁷ See in particular Constitution of the Republic of South Africa, 1996, at section 23; Labour Relations Act 66 of 1995 chapter VIII (“Unfair Dismissals and Unfair Labour Practices”). For further discussion, see D. du Toit et al., *Labour Relations Law: A Comprehensive Guide* (6th edn, Lexis Nexis 2015) ch 8-9.

¹⁶⁸ The Rental Housing Act 50 of 1999 seeks to regulate “unfair practice” in residential leases. This term is defined in section 1 and is used throughout the Act.

¹⁶⁹ Chapter 2 part G of the Consumer Protection Act 68 of 2008 gives a consumer the right to “fair, just, and reasonable terms and conditions” in contractual relations subject to the Act.

¹⁷⁰ The National Credit Act 34 of 2005 creates a detailed system of rights for consumer debtors, as well as prescribing procedures for debt “enforcement” and repossession of goods sold on credit. The Act also creates for the first time in South Africa a procedure whereby “over-indebted” consumers may have their debts restructured.

¹⁷¹ See eg *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA).

¹⁷² Compare the clause cited in *ibid* [3].

¹⁷³ *Silent Pond Investments CC v Woolworths (Pty) Ltd* 2011 6 SA 343 (D). For discussion of this type of clause with reference to both South African and English law, see T. Boxall, A. Hutchison & M. Wright, “NEC3ECC Clause 10.1: An

be an outlier, as I have argued elsewhere.¹⁷⁴ A final example is the clause creating a discretionary contractual power, particularly the power to determine the performance of an opposing party during the subsequent course of a contractual relation. The prevailing common law position here is that such a power must be exercised rationally, as is the case in English law.¹⁷⁵ This South African standard of rationality is derived from Roman law, and is reflected in the phrase: *arbitrium boni viri*.¹⁷⁶ This fetters, for example, the unilateral power of a bank to change an interest rate under a mortgage agreement.¹⁷⁷ More controversially, Price and I have argued that South Africa seems to be heading in a direction of fettering on the basis of objective reasonableness.¹⁷⁸ An example we used was the overturning of an otherwise seemingly valid cancellation of a contract in *Botha v Rich NO* (discussed in part II above).¹⁷⁹

The above sample are examples of the use of a good faith standard to underpin other technical rules of contract law in South Africa, which reinforces the statement to this effect by the Constitutional Court in *Barkhuizen*.¹⁸⁰ Thus to a South African

Enforceable Contractual Duty of Trust and Co-operation in the Construction Industry?" (2017) 28 Stellenbosch L R 97.

¹⁷⁴ *ibid* 110-111, 113-114.

¹⁷⁵ For discussion, see A. Cockrell, "Second-Guessing the Exercise of Contractual Power on Rationality Grounds" (1997) *Acta Juridica* 26, 32-34; A. Price & A. Hutchison, "Judicial review of exercises of contractual power: South Africa's divergence from the common law tradition" (2015) 79 *Rabels Zeitung* 822, 835-838.

¹⁷⁶ This translates as "according to the judgment of a good man", or more loosely as "according to a reasonable decision". *NBS Boland Bank v One Berg River Drive CC and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) [25]. See further Cockrell, "Second Guessing" (n 175) 32-34; Price & Hutchison, "Judicial Review" (n 175) 835-38.

¹⁷⁷ This was the finding in *NBS Boland Bank v One Berg River Drive CC and Others* 1999 (4) SA 928 (SCA). For a very similar UK case, see *Paragon Finance PLC v Nash* [2001] EWCA Civ 1466.

¹⁷⁸ Price & Hutchison, "Judicial Review" (n 175) 843-44.

¹⁷⁹ *Botha* (n 21) [50]-[51].

¹⁸⁰ *Barkhuizen* (n 7) [82].

reader, the concept of an organising principle as used by the Canadian Supreme Court came as no surprise and indeed made logical sense. What is more controversial in South Africa, however, is where to peg the good faith standard. I will discuss this normative question next.

2. Where to peg a standard of good faith (or ubuntu)?

Good faith is a concept usually best defined by example, as I have done in the previous part IV.B.1 above. The overview provided there also demonstrates that the functional equivalents of the concrete manifestations of a specific duty of good faith in the Canadian Common law are also to be found in the South African law of contract.

But what normative standard does good faith impart? In part II above, I quoted several examples of judicial dicta of recent times which suggest abstract answers to this question. The South African case law discussions of good faith are typically briefer and vaguer than that of *Bhasin*, or of the English case of *Yam Seng*.¹⁸¹ Because of the Roman Dutch law origins of the South African system, all contracts are by historical definition based on good faith, so that the doctrine is much less controversial. But that does not answer the question of where to peg the normative standard. Does South African law go beyond a standard of honest performance alone into further realms of reasonableness, or perhaps even communal solidarity? Here we run into the difficulty of overlapping conceptual terminology.

Good faith in a basic sense of rationally defensible conduct which is not arbitrary and is not motivated by bad faith or fraud (or in the positive sense is “honest”), would impose a basic subjective standard on contracting parties. It would be possible to defend a standard of this nature with regard to the historic South African case law, although whether it would be

¹⁸¹ *Yam Seng* (n 6).

independently actionable may be more controversial.¹⁸² As we saw in part II, the Constitutional Court has in the past used the phrase good faith in its decisions, but this was usually in the sense of an underlying value. When it comes to public policy, unconscionability, and ubuntu, however, could a wider duty of objective reasonableness be imposed on parties? Recent High Court jurisprudence discussed in part II above would certainly suggest that this is one plausible interpretation of the trajectory of the law.

The South African legislature has already enacted many statutes to protect weaker parties, thereby extending constitutional-inspired rights and duties which relate to community norms and social justice into many areas of contracting. Beyond these statutes, the common law exists as the realm of largely commercial contracts. Here, given the heterogeneous nature of South African society, a standard of community in contracting should be defined in minimal terms with room for the parties to engage in a measure of private ordering.¹⁸³ If a duty of fair dealing is to go beyond a core of rationality, with community values intruding into a private contractual relationship, the specific business dealings of the immediate parties and their context should be used to define the notional community whose standards must be determinative.¹⁸⁴ This allows for the particularist style of

¹⁸² For South African examples of good faith being given as a standard akin to honesty or rationality, see *South African Forestry Co Ltd v York Timber Ltd* 2005 (3) SA 323 (SCA) [33], where it was held that there was a duty “not to frustrate” the legitimate exercise by the other party of their rights under a contract; and *NBS Boland Bank v One Berg River Drive CC and Others* 1999 (4) SA 928 (SCA) [25]-[28], where a standard of rationality fettering the exercise of a discretionary contractual power was said to be the same as one of good faith. For a statement to the effect that the duty of good faith in contract does not found an independent challenge to a contract, see *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [22].

¹⁸³ Compare the argument in J. Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (CUP 2013).

¹⁸⁴ cf Campbell “Good Faith” (n 134).

adjudication favoured by the Constitutional Court, and is also one possible interpretation of the existing case law from this court. Indeed, it is typically egregious cases of exploitative conduct which reach this court, with more commercial cases like the lease in *Everfresh*, or the insurance contract in *Barkhuizen*, being slightly atypical. A general duty of ubuntu-based communal solidarity beyond this is best left to the private ordering devices of a given business community, or the policing of unconscionability ex post under the public policy rule. Ubuntu should not become an independent ground on which to attack contractual dealings, just as this strong role has never been permitted to the (narrower) concept of good faith in South Africa's past.

Ubuntu is a broader standard than good faith – the literature and case law speak to a role for community, which implies an objective standard of conduct beyond mere honesty. There is scope here for a new epistemology¹⁸⁵ of contracting, which places indigenous social norms at its centre. Even here, however, ubuntu should continue to play the role of underlying value in contract law. The conceptual overlap between good faith and ubuntu should be expressly unpacked and clarified by the Constitutional Court. Commercial contracting in an indigenous setting relies largely on private ordering for its operation, and even there does not generally require a duty of altruism or fiduciary loyalty from a contracting party beyond the social responsibility of moderate community. Outside of the localised community setting, a healthy dose of minimalism should (in my view) be used in defining ubuntu (or good faith), with more detailed regulation being left to more context sensitive regulatory mechanisms.

¹⁸⁵ By this I refer to the different process by which indigenous law is created in South Africa (community practice considered to have binding force, ie the living law) and transmitted through generations (via an oral tradition). Written sources of indigenous law are usually disparagingly referred to as 'official' law in South Africa. See Himonga & Nhlapo, *African Customary Law in South Africa* (n 92) ch 2.

V. CONCLUSION

To a South African reader, my argument thus far may have been read as equivocal: on the one hand, I have argued for a more inclusive view to be taken of South African contract law and practice, particularly with regard to the contexts in which business takes place. Thus, the articulation of ubuntu above located this motif in the setting of an indigenous African marketplace – as found in South Africa’s popular economies – and subject to the norms of the communities that reside there. On the other hand, I have argued for a stricter reading of this concept than that favoured by many leftist South African academics and indeed for one (in part) different from the vision of transformative constitutionalism stated in certain leading texts. My defence of this politics of contract law, is that it is one which is contextualised within the economic demands of the South African marketplace, particularly the need for increased business confidence in the political economy, investment, and economic growth. Certainty of contract law is typically a feature of legal systems which are popular among merchants, such as English law – indeed legal services are a key English export.¹⁸⁶ It is for this reason that I cite with approval the arguments of English theorists Campbell and Morgan above, despite the fact that the politics of their commercial contract law visions are vastly removed from what is currently fashionable in the South African academy. The incorporation of an indigenous norm of ubuntu, as a concept similar to, but in part as a replacement of, good faith, into South African contract law, is a positive development and a timely politico-legal intervention. This measure should not, however, ignore the fact

¹⁸⁶ Statistics supporting this claim are quoted and discussed in R. Halson & D. Campbell, “Harmonisation and its discontents: A transaction costs critique of a European contract law” in J. Devenney & M. Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (CUP 2013) 100.

that contracts must be upheld in the indigenous popular economy no less than in the context of large commercial transactions between blue chip South African companies.

What I am describing, however, are the norms of the commercial marketplace where contracts are concluded by parties of similar levels of bargaining power. This is indeed the realm which the common law of contract has been relegated to after the advent of a (consumer) statute law specifically designed to protect weaker parties. In consumer law there is a clear need for fairness jurisdiction to be given to courts (as well as to various lower level alternate dispute resolution tribunals) in order to prevent an abuse of market power against weaker parties. There is great scope here for indigenous norms, including (but not limited to) ubuntu,¹⁸⁷ to be reflected in the interpretation of these statutes to give effect to a transformed constitutional regime of contracting. My argument is that it is this key differentiation between contexts of contracting which leaves room for me to call for a more liberal market/private ordered realm in which the common law can operate.

In conclusion, and on a comparative law note: the legal culture of South Africa is changing fast. It appears that a similar process is happening in other commonwealth jurisdictions: the findings of the Canadian Supreme Court in *Bhasin* speak to a movement away from the strictures of the traditional English law position. This reflects similar developments in certain parts of Australia,¹⁸⁸ and indeed at High Court level within the

¹⁸⁷ For example, Bähre, *Money and Violence* (n 105) 136 speaks of a value of *ukunceda*, which his research participants, most of whom were of Xhosa ethnicity, translated as 'helping each other'. Bähre describes how his participants described their contract practice as being informed by this value, rather than ubuntu.

¹⁸⁸ The Australian state of New South Wales in particular seems to be moving in this direction, see for example: *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349.

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English jurisdiction itself.¹⁸⁹ It appears that a norm of good faith is no longer as controversial as it used to be, but also that the methodology of these legal developments remain decidedly within the English Common Law tradition and speak to the long-held sentiment there that commercial practice should govern commercial law.¹⁹⁰

¹⁸⁹ *Yam Seng* (n 6). Note that the findings of this case on good faith were in part overruled in: *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 [105].

¹⁹⁰ Lord Devlin, "The Relation between Commercial Law and Commercial Practice" (1951) 14 MLR 249; Lord Goff, "Commercial Contracts and the Commercial Court" [1984] LMCLQ 382; Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433; C. Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart 2013); Morgan, *Contract Law Minimalism* (n 183)